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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1942**

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# No. 297

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HERMAN FREDERICK WILLKIE,
*Petitioner,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

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The petitioner, Herman Frederick Willkie, by his undersigned attorney, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment of that court entered in the above cause on May 12, 1942 (R. 93).

### Nature of the Controversy.

This is a proceeding involving a deficiency in income taxes in the amount of $4,427.73, asserted against the petitioner by the respondent for the taxable year 1937.

The basis for the deficiency asserted by the respondent was that an amount of $15,000, reported by the petitioner as a gift received from Hiram Walker & Sons, Inc., in

1937, constituted taxable income as additional compensation paid for past services (R. 7-8). The Board of Tax Appeals sustained the determination of the respondent and the Circuit Court of Appeals for the Sixth Circuit affirmed the decision of the Board.

## Statement of Facts.

Hiram Walker-Gooderham & Worts, Limited, is a Canadian company which operates entirely through subsidiaries. It is the parent company of the corporations hereinafter referred to (R. 15-16).

Hiram Walker & Sons, Limited, is the subsidiary operating in Canada; Hiram Walker & Sons, Incorporated, is the subsidiary operating in the United States, and Hiram Walker & Sons of Scotland, Limited, was organized early in 1937, prior to May 1, and is the subsidiary operating in Scotland (R. 16).

Petitioner was originally employed by Hiram Walker & Sons, Limited, on February 15, 1927, and later became its general superintendent and a director of that company. Hiram Walker & Sons, Incorporated, was incorporated in 1933 and petitioner became vice president in charge of production of that company, his duties being to build, organize and operate a distillery in Peoria, Illinois (R. 16).

Petitioner became a director of Hiram Walker-Gooderham & Worts, Limited, about November, 1933, and received an annual director's fee of $2,000 per year. Petitioner devoted practically all of his time to the affairs of Hiram Walker & Sons, Incorporated, and his salary was paid by that company. For the years 1936 and 1937, his salary was $30,000 per year. This was like in amount to the salary received by the chairman of the boards of the parent company and Hiram Walker & Sons, Incorporated,

and was equal to 75% of the salary received by the president of Hiram Walker & Sons, Incorporated (R. 16).

Early in 1937, petitioner went to Scotland to assist in the launching of the new company there, whose plant and equipment he had designed. During this time in Scotland, he was paid his regular salary by Hiram Walker & Sons, Incorporated (R. 16).

On May 12, 1937, petitioner tendered his resignation as an employee of Hiram Walker & Sons, Incorporated, to its president, Mr. Hume (R. 16). The latter then told the petitioner he would rather not accept the resignation until it could be discussed at a meeting of the board of directors of the parent company (Hiram Walker-Gooderham & Worts, Limited), which was to be held about ten days later. The petitioner agreed to this but stated that his determination to resign was unalterable (R. 16, 27-28). Thereafter, the petitioner performed no duties (R. 28).

On May 28, 1937, petitioner attended the meeting of the parent company and restated his resignation as an employee and director of Hiram Walker & Sons, Incorporated. He stated his reasons to be that he felt that his talents were not being fully utilized and that his major work had been completed. After a request for reconsideration, which petitioner refused, his resignation was accepted. He then left the meeting. Thereafter the following resolution was passed by the board of directors (R. 17):

> "It was moved by Mr. McCarthy, seconded by Mr. Lash, and unanimously carried that Mr. Willkie be given a cheque equal to six months' salary in appreciation of services rendered" (R. 17).

Later on that day, Mr. Hatch (Chairman of the Boards of the parent company (R. 28) and of Hiram Walker & Sons, Incorporated (R. 43)) sent for petitioner and told him that he had voted to give petitioner a present of

$15,000. Petitioner replied, "I don't want you to do that." Mr. Hatch then stated: "Well, we feel that we want to." Petitioner again refused, stating, "Well, I still feel the same way about it. I have been fully compensated for my services and you owe me nothing, and I don't want a gift from you." Hatch insisted and said, "It wasn't just me. The Board was unanimous in their decision." Petitioner, however, merely indicated again his refusal (R. 31).

At that time petitioner had been paid all sums due him under his contract of employment with Hiram Walker & Sons, Incorporated, and as a director of the parent company (R. 17).

A few days later, petitioner went to Mr. Hume's office and told him that he (the petitioner) "probably had not been very gracious about the action they had taken." Mr. Hume thereupon gave petitioner a check of Hiram Walker & Sons, Incorporated, in the amount of $15,000 (R. 36).

At no time during the petitioner's employment by the corporations above described had any of them had a policy of paying bonuses or additional compensation to officers (R. 37).

Petitioner did not report the $15,000 as taxable income on his federal income tax return for 1937 (R. 39), but indicated that he had received that amount as a gift from Hiram Walker & Sons, Incorporated (R. 17). The federal income tax return of Hiram Walker & Sons, Incorporated, for the year in question showed that it deducted the $15,000 for the purpose of arriving at its taxable income, claiming it as compensation paid petitioner (R. 17).

The parent company, Hiram Walker-Gooderham & Worts, Limited, had power during 1937 to make a gift to an employee or former employee of the parent company or its subsidiary, Hiram Walker & Sons, Incorporated (R. 17).

## The Question Presented.

Whether the Board and the Court below were correct in characterizing as "compensation for personal service" within the meaning of Section 22 (a) of the Revenue Act of 1936,* the $15,000 received by the petitioner from Hiram Walker & Sons, Incorporated, as a present, "in appreciation of services rendered", after petitioner had severed all connections with and been fully compensated for all services rendered Hiram Walker & Sons, Incorporated.

## Reasons for Granting the Writ.

I. There is a conflict among the decisions of the various circuit courts of appeal on the question here involved which should be resolved by this Court. Agreeing with the Court below are: in the First Circuit, *Walker* v. *Commissioner,* 88 F. (2d) 61 (C. C. A. 1, 1937); in the Second Circuit, *Fisher* v. *Commissioner,* 59 F. (2d) 192 (C. C. A. 2, 1932); and in the Ninth Circuit, *Botchford* v. *Commissioner,* 81 F. (2d) 914 (C. C. A. 9, 1936). Reaching the opposite result are: in the Third Circuit, *Jones* v. *Commissioner,* 31 F. (2d) 755 (C. C. A. 3, 1929); *Cunningham* v. *Commissioner,* 67 F. (2d) 205 (C. C. A. 3, 1933); in the Fourth Circuit, *Hall* v. *Commissioner,* 93 F. (2d) 1005 (C. C. A. 4, 1938); and in the Fifth Circuit, *Simpkinson* v. *Commissioner,* 93 F. (2d) 1015 (C. C. A. 5, 1937).

The sharp conflict between these decisions of the several circuit courts of appeal on the basic question whether amounts, in addition to all compensation due, which are given a departing employee, are compensation for personal services, is clearly shown by the comparative analysis of the salient facts of the above cases set forth in the Appendix, infra, p. 19.

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* The statute and regulations are set out in full in the Appendix, infra, p. 18.

II. The Court below has decided the question here involved in a way which conflicts with the applicable decision of this Court, in that it failed to follow the rule of *Bogardus* v. *Commissioner*, 302 U. S. 34 (1937), which held that payments made to a former employee in recognition of his valuable and loyal services did not constitute "compensation" for personal services within the meaning of the Revenue Act of 1928. The lower Court's failure to give proper effect to the said decision of this Court is shown by the comparison of the facts in the two cases which is set forth in the Appendix, *infra*, p. 19.

III. The Court below stated:

> "We may substitute our judgment for that of the Board in determining whether the present payment was a gift. *Bogardus* v. *Commissioner of Internal Revenue*, 302 U. S. 34, 38" (R. 96).

The Court subsequently discussed the evidence and decided that the amount in question was compensation rather than a gift to petitioner. In arriving at this decision, the Court adopted and gave weight to the following presumption, for which, as clearly appears from the Court's statement, there is no support whatsoever in the record:

> "The petitioner having failed to put in evidence the book entries made on the payor's books simultaneously with the payment in question, we presume such entries would support the deduction claimed in the payor's income tax return and that such book entries would show that the payor treated the sum paid the petitioner as compensation.
>
> "When the income tax deduction of the payor is tied to its earlier book entries on the subject, the evidence of the deduction is of weight in deciding the question of whether or not the payment was a gift to petitioner.
>
> "All of the elements to be taken into account in determining whether the present payment was a gift or compensation for past services lead to the conclusion

that the sum received by the petitioner constituted a part of his gross income for the tax year in question'' (R. 97-8).

In basing its decision, in part, upon evidence—this presumption—not of record, the Court so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable Court directed to the United States Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in this cause to the end that this cause may be reviewed and determined by this Court according to law, and that your petitioner may have such other and further relief as to this Court may seem proper and in conformity with law.

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## BRIEF IN SUPPORT OF PETITION.

### Opinions Below.

The opinion of the United States Board of Tax Appeals is unreported and appears at R. 15. The opinion of the Circuit Court of Appeals (R. 93-9) was rendered on May 12, 1942, and is as yet unreported.

### Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; Sec. 347 U. S. Code, Title 28. The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on May 12, 1942.

### Statement of the Case.

The principal facts are set forth in the petition at pages 2 to 4.

### Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that the $15,000 received by the petitioner from Hiram Walker & Sons, Incorporated, was "compensation for personal service" within the meaning of Section 22(a) of the Revenue Act of 1936.

2. In adopting and giving weight to a presumption that because petitioner failed to put in evidence the book entries made by Hiram Walker & Sons, Incorporated, "such book entries would show that the payor treated the sum paid the petitioner as compensation."

3. In affirming the decision of the Board of Tax Appeals.

### The Statutes Involved.

The statutes and regulations involved are set forth in full in the Appendix, infra, p. 18.

## Argument.

I. There is a conflict of decisions in the various Circuit Courts of Appeal on the question here involved that should be resolved by this Court.

The basic question is whether amounts distributed by an employer constitute "compensation for personal service" or "gifts" under the Revenue Acts, when the distributions are made to a departing employee without legal or moral obligation therefor and without expectation of future benefit therefrom. This is not a question of fact, but a "conclusion of law or at least a determination of a mixed question of law and fact." *Bogardus* v. *Commissioner,* 302 U. S. 34, 39 (1937). It turns upon the interpretation accorded the words "compensation for personal service" and "gift". The various circuit courts of appeal are sharply split on the proper limits of these terms. The decisions cannot be distinguished adequately on their facts. The basic thread of absence of present or anticipated consideration, either in form or substance, runs through them all. In addition, each case contains mutually contradictory factors indicating, on the one hand, that the payment is inspired by good will (hence a gift) and, on the other, that the causative factor is past services (hence compensation). Diametrically opposed decisions will continue to issue from different circuit courts on practically identical fact situations until this Court lays down a rule as to the proper interpretation of the statutory terms.

Thus, three Circuit Courts have decided the question in accord with the decisions of the lower Court here. *Walker* v. *Commissioner,* 88 F. (2d) 61 (C. C. A. 1, 1937), involved the same fact situation subsequently passed upon by this Court in *Bogardus* v. *Commissioner, supra,* and set forth in detail, *infra,* pp. 12-15. In the *Walker* case, the First Circuit held that the payments involved constituted com-

pensation taxable to the recipient. The Court (Morton, C. J., dissenting) relied upon *Old Colony Trust Company* v. *Commissioner,* 279 U. S. 716, 730 (1929), for the proposition that an entirely voluntary payment for services is compensation; but added that, in any event, the Board had determined on conflicting evidence that the payments involved were compensation and "* * * its determination was final." (at p. 63) Despite the express disapproval of the *Walker* decision by this Court in the *Bogardus* opinion (302 U. S. 34, 42), the decision in the *Walker* case appears to be considered the law of the First Circuit. The lower Court here cites it for the proposition that payments made "in appreciation of services rendered" constitute a "bonus" and "remuneration" (R. 96-7). Further, the Board of Tax Appeals very recently cited the *Walker* case as representing the views of the First Circuit on the question here involved. *Samuel Poorman, Jr.,* 45 B. T. A. 73, 80 (1941). Thus the *Walker* decision still stands in sharp conflict with the decisions of other circuits, as the First Circuit's position that amounts paid by a former employer without legal or moral consideration and without expectation of future benefit, constitute compensation.

The decision in *Fisher* v. *Commissioner,* 59 F. (2d) 192 (C. C. A. 2, 1932), is to the same effect. There a veteran employee upon resigning his employment was handed his employer's check for $6,000, in addition to payment of all compensation due. At no time in his twenty-four years of service had the employee received from his employer any amounts beyond his regular compensation, nor had the employer ever paid a bonus to any of its officers or employees. Payment of the $6,000 in question was informally approved by the employer's executive committee and there was no other corporate action thereon. The petitioner's superior officer had stated, to the employee prior to the payment, that the employer "would do something for him" on resignation. When made, the payment was charged to

the employer's salary account on its books. Conceding there was no legal duty on the employer to pay the $6,000, the Court, relying heavily on the *Old Colony Trust Company* case, supra, held it to be compensation for past services.

In *Botchford* v. *Commissioner,* 81 Fed. (2d) 914 (1936), the Ninth Circuit held that a payment in excess of all compensation due, made by an employer to its former employee after his resignation, constituted compensation taxable to the latter. This was in the face of testimony of the employer's directors that the payment was intended as a gift. The Court's position was that language in the director's resolution authorizing the payment, which characterized the payment as remuneration, together with the employer's action in claiming an income tax deduction for the payment as "salary", fixed the character of the payment as compensation. Here, too, there was no obligation on the employer or expectation of future benefit.

In conflict with these decisions from the First, Second and Ninth Circuits and the lower Court here are the following decisions of the Third, Fourth and Fifth Circuit Courts of Appeals.

*Jones* v. *Commissioner,* 31 F. (2d) 755 (C. C. A. 3, 1929) held that payments made from the funds of two liquidating corporations to former employees thereof, were gifts and not taxable income to the recipients. The Board of Tax Appeals had held the payments taxable as compensation for services rendered. The basis of the Circuit Court's decision was that the stockholders of the liquidating corporations made the payments "without obligation on their part * * * in recognition of the past faithful work of the staff * * *" (at p. 756).

In *Cunningham* v. *Commissioner,* 67 F. (2d) 205 (1933), the Third Circuit again passed on the basic question. There, upon the resignation of an employee, the employer paid him $15,000 "* * * in appreciation of Mr. Cunningham's excellent guidance of this Corporation through

times of difficulty and depression * * * as an honorarium * * *" (at p. 205). On the basis that this was a voluntary payment which the employer was under no obligation to pay, the Court held it to be a gift and reversed the Board of Tax Appeals' decision that the payment was compensation for past services.

*Hall* v. *Commissioner,* 93 F. (2d) 1005 (C. C. A. 4, 1938) and *Simpkinson* v. *Commissioner,* 93 F. (2d) 1015 (C. C. A. 5, 1937) both involved the same fact situation that came before this Court in *Bogardus* v. *Commissioner, supra.* On these facts, which are set forth, infra, p. 12-15, both Courts on the authority of the *Bogardus* decision, reversed the Board of Tax Appeals and held the payments involved to be gifts rather than compensation.

Thus the basic question remains unsettled. The lower Court here and the decisions in accord therewith seemingly hold that any payment by an employer to a former employee is compensation if inspired by the past services of the recipient. The contrary decisions require either a present or future consideration flowing to the employer. This Court should resolve the existing confusion and limit the boundaries of "compensation for personal service" and "gifts" within the meaning of the Revenue Acts.

II. The Court below decided this case in a way in conflict with the applicable decision of this Court, namely, *Bogardus* v. *Commissioner,* 302 U. S. 34 (1937).

In *Bogardus* v. *Commissioner,* 302 U. S. 34 (1937) this Court held that payments to employees of a corporation, made by its former stockholders acting through a successor corporation, "in recognition of the valuable and loyal services" of such employees and made after all compensation due had been fully paid, did not constitute taxable income to the recipients.

The facts in that case were, briefly, these: Universal Oil Products Company was succeeded, as to a part of its

properties, by Unopco Corporation. The former stockholders of Universal became stockholders of Unopco with the same proportionate holdings. The stock of Universal (which presumably continued in existence) was then sold by such stockholders to United Gasoline Corporation. Thereafter, the stockholdeers, acting through their new corporation, Unopco, made substantial payments to certain past and present employees of Universal and Unopco. These payments were variously characterized in resolutions of Unopco's directors and stockholders and in statements by individual stockholders, as a "bonus * * * in recognition of the valuable and loyal services of the employees" (at p. 42) and as a "gift or honorarium" (at p. 43).

This Court stated the question to be "* * * whether a sum of money received by petitioner in January, 1931, was 'compensation' subject to the federal income tax, or a gift exempt therefrom" (p. 35). After referring to the decision below, the Court stated: "The decisions of other courts of appeal upon the question under review are conflicting." Numerous cases were then cited in which, respectively, payments made by an employer to a past or present employee were held to be either "compensation" or a "gift" (at p. 35). The Court then proceeded to clear up the misapprehension previously existing as to whether the terms "compensation" and "gift" as used in the Revenue Acts, were mutually exclusive (at p. 39). The opinion then discussed at length the distinguishing attributes of a gift and compensation in the situation of a payment by an employer to a past or present employee and, it is submitted, established the principle that a payment, made without legal or moral obligation and without expectation of future benefit, is not taxable to the recipient (at pp. 42-43). That the decision established this principle is supported by the following statement from the dissenting

opinion (at pp. 44-45). "A payment received as compensation for services is taxable as income, though made without consideration, and hence for many purposes a gift. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 730. To hold, as the prevailing opinion seems to do, that every payment which in any aspect is a gift is perforce not compensation, and hence relieved of any tax, is to work havoc with the law. A large body of decisions, whose provenance is *Old Colony Trust Co.* v. *Commissioner,* would be annulled by such a test (citations). Their teaching makes it plain that the category of 'gift' and 'compensation' are not always mutually exclusive, but at times can overlap."

The court below expressly failed to recognize that the *Bogardus* decision of this Court established the rule that "compensation" and "gift" are mutually exclusive terms and that a payment by an employer is not taxable as compensation, where it bears the aspects of a gift in being made without legal or moral obligation and without expectation of future benefit. Thus the court below stated:

> "In reference to the *Bogardus* case, it should be borne in mind that it is unsafe to classify adjudicated cases upon any complex question of law and to extract from them rules of general application as the reasoning in such cases is often due to their diversities. It is therefore wiser to decide each case upon its own peculiar state of facts as to do otherwise, leads us into the field of abstract reasoning. The *Bogardus* case illustrates the necessity of following this rule. It discusses numerous cases from the circuits and from the Court of Appeals of the District of Columbia, overrules none of them and leaves each as positive authority coextensive with the facts on which the opinion was founded" (R. 98).

The conflict between the decision of the lower court here and the *Bogardus* decision stems from the lower court's express failure to recognize and follow the well considered rule of the latter case. There can be no dispute that here

petitioner received $15,000 without an iota of legal or moral obligation resting on his former employer and without the slightest expectation on the employer's part to derive any future benefit therefrom. Whether, as we assert and the lower court denies, the *Bogardus* case established a principle of general application as the minority therein felt it does, should be decided by this Court upon a review of this case. The implications of the question go beyond the importance of this case to the individual petitioner. Other lower courts undoubtedly will seize upon the above quoted language from the lower court's opinion here, and the confusion sought to be eliminated by this Court when it reviewed the *Bogardus* case on the basis of a then existing conflict will arise anew.

III. The court below in adopting and giving weight to a presumption against the petitioner, without any basis in the record, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The court below had the power to reach an independent judgment as to whether or not the payment in question was to be characterized as "compensation for personal service" within the meaning of the Revenue Act. *Bogardus* v. *Commissioner*, 302 U. S. 34 (1937); *Helvering* v. *Tex-Penn Oil Company*, 300 U. S. 481 (1937). The lower court exercised this power. After considering "all of the elements to be taken into account in determining whether the present payment was a gift or compensation for past services * * *", the court reached the latter conclusion (R. 98).

In weighing the conflicting facts of record to arrive at this conclusion, the lower court raised and gave weight to an unwarranted presumption. Thus, it stated:

> "The taxpayer having failed to put in evidence the book entries made on the payor's books simultaneously with the payment in question, we presume such entries

> would support the deduction claimed in the payor's income tax return and that such book entries would show that the payor treated the sum paid the petitioner as compensation" (R. 97).

Neither the Commissioner nor the Board had made any determination or finding as to what these book entries, if any, were, nor was any evidence adduced at any stage of the proceedings to show what book entries, if any, were made by Hiram Walker & Sons, Incorporated, or Hiram Walker-Gooderham & Worts, Limited, with respect to this payment.

The lower court in raising a presumption that the book entries, if produced, would have tended to prove one thing rather than another, was simply indulging in speculation. It is submitted that in going outside the Record to presume the existence of this fact, which it then weighed with the facts of record in reaching its decision, the Circuit Court committed reversible error. This Court either should substitute its judgment, based on the record, for that of the lower court or it should remand the case for decision on the record. The proposition is too clear to require citations that where a fact-finding tribunal considers inadmissible evidence, an appellate court will not attempt to weigh the effect of such evidence on the lower court's decision. Here the fact presumed may have had great or little influence on the Circuit Court. Apparently, used to show the intention of the payor, the weight accorded this assumed fact probably was great. Thus the court stated:

> "When the income tax deduction of the payor is tied to *its earlier book entries* on the subject, *the evidence of the deduction is of weight* in determining whether or not the payment was a gift to petitioner" (R. 97-8). (Italics supplied.)

No basis for the lower court's presumption can arise from the petitioner's failure to introduce the books of Hiram Walker & Sons, Incorporated, or Hiram Walker-

Gooderham & Worts, Limited. At the time this case was tried, the petitioner had no connection whatsoever with those companies. He was employed by a principal competitor thereof (R. 18). Clearly, the books in question were in no way under petitioner's control, and it may be doubted that it would have been possible for him to produce them. On the other hand, the respondent had ample power to compel the production of these books. Therefore, there is more basis for assuming that the book entries were unfavorable to respondent than there is for the presumption adopted by the lower court. As respondent's failure to produce these books could not be construed as an "admission" by him as to their contents, *a fortiori*, the lower court's action in adducing evidence in the nature of an "admission" against the petitioner was unfounded.

**Conclusion.**

It is respectfully submitted that this Court should review the instant case, in order to resolve the conflict of decisions in the several circuit courts as to the proper interpretation of the phrase "compensation for personal service"; in order to correct the lower court's failure to recognize the rule of general application laid down by this court in the *Bogardus* case; to correct the lower court's departure from accepted judicial procedure in presuming and giving weight to a fact not of record, and that the writ should issue as prayed.

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## APPENDIX.

### Statute and Regulations Involved.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 22. GROSS INCOME

(a) *General Definitions.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid. * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * * * *

(3) *Gifts, bequests, and devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);

* * * * * * *

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 22 (a)-2. *Compensation for personal services.*—Commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, pay of persons in the military or naval forces of the United States, retired pay of Federal and other officers, and pensions or retiring allowances paid by private persons or by the United States are income to the recipients; as are also marriage fees, baptismal offerings, sums paid for saying masses for the dead, and other contributions received by a clergyman, evangelist, or religious worker for services rendered. However, so-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and are not taxable. * * *

## COMPARATIVE STATEMENT OF FACTS

| Case | Moral or legal obligation to make payment | Expectation of future benefit to payor | Language of payor on making payment | | Deduction taken by payor in its income tax return | Holding: Compensation or gift |
|---|---|---|---|---|---|---|
| | | | Indicating gift | Indicating compensation | | |
| *Botchford* v. *Com'r.* 81 F(2d) 914 (C.C.A. 9, 1936) | None | None | "Whereas D. H. Botchford resigned . . . after having been in the service of this Corporation and its predecessor for many years; and Whereas the condition of the health of D. H. Botchford might make it difficult for him to procure immediate remunerative employment." | "D. H. Botchford, Remuneration: . . . "An additional year's salary be credited to Mr. Botchford . . . to be paid in . . . monthly instalments" | Yes | Compensation |
| *Willkie* v. *Com'r.* (C.C.A. 6, May 12, 1942) | None | None | "that Mr. Willkie be given a cheque . . . in appreciation . . ." "Mr. Hatch stated (the Board of Directors) had voted to give petitioner a present." | ". . . equal to six months' salary in appreciation of services rendered." | Yes | Compensation |
| *Fisher* v. *Com'r.* 59 F(2d) 192 (C.C.A. 2, 1932) | None | None | Recipient was told the Company "would do something for him" on his termination of employment. | | Yes | Compensation |
| *Walker* v. *Com'r.* 88 F(2) 61 (C.C.A. 1936) | None | None | "a bonus . . . in recognition of valuable and loyal services . . ." "a nice and generous thing to show their appreciation by remembering them (employees) in the form of a 'gift or honorarium' 'presents or gifts'" | "be appropriated, paid and distributed . . . to . . . former and present employees in recognition of the valuable and loyal services of said employees . . ." | No | Compensation |
| *Bogardus* v. *Com'r.* 302 U.S. 34 (1937) | None | None | "a bonus . . . in recognition of valuable and loyal services . . ." "a nice and generous thing to show their appreciation by remembering them (employees) in the form of a 'gift or honorarium' 'presents or gifts'" | "be appropriated, paid and distributed . . . to . . . former and present employees in recognition of the valuable and loyal services of said employees . . ." | No | Gift |
| *Hall* v. *Com'r.* 93 F(2d) 1005 (C.C.A. 4, 1938) | None | None | "a bonus . . . in recognition of valuable and loyal services . . ." "a nice and generous thing to show their appreciation by remembering them (employees) in the form of a 'gift or honorarium' 'presents or gifts'" | "be appropriated, paid and distributed . . . to . . . former and present employees in recognition of the valuable and loyal services of said employees . . ." | No | Gift |
| *Simpkinson* v. *Com'r.* 93 F(2d) 1015 (C.C.A. 5, 1937) | None | None | "a bonus . . . in recognition of valuable and loyal services . . ." "a nice and generous thing to show their appreciation by remembering them (employees) in the form of a 'gift or honorarium' 'presents or gifts'" | "be appropriated, paid and distributed . . . to . . . former and present employees in recognition of the valuable and loyal services of said employees . . ." | No | Gift |
| *Jones* v. *Com'r.* 31 F(2d) 755 (C.C.A. 3, 1929) | None | None | . . . "in consideration of such a sudden termination of the business association and in recognition of the efforts and devotion of the officers and certain old employees . . ." | "and to pay from the proceeds of such sale in excess of $55 per share . . . (proportionate shares) of the $150,000 as voted by the present Board of Directors for distribution among the present officers of the company" | No | Gift |
| *Cunningham* v. *Com'r.* 67 F(2d) 205 (C.C.A. 3, 1933) | None | None | "Resolved, that in appreciation of Mr. Cunningham's excellent guidance of the Corporation through times of difficulty and depression a sum of $15,000 be . . . awarded to Mr. Cunningham as an 'honorarium . . .'" | "a sum of $15,000 be awarded to Mr. Cunningham . . . said sum to be payable forthwith." | Did not appear | Gift |

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481877—42

# In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 297

HERMAN FREDERICK WILLKIE, PETITIONER

*v.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 15–18) is not reported. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 93–99) is reported at 127 F. (2d) 953.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 12, 1942 (R. 93). The petition for writ of certiorari was filed August 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

## QUESTION PRESENTED

The petitioner was employed at $30,000 a year. Upon his resignation, he was given an additional $15,000 "equal to six months' salary in appreciation of services rendered." Was the $15,000 properly subjected to federal income tax as additional compensation under Section 22 (a) of the Revenue Act of 1936?

## STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, * * *.
>
> (b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:
>
> * * * * *
>
> (3) *Gifts, bequests, and devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);
>
> * * * * *

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

> ART. 22 (a)-2. *Compensation for personal services.*—Commissions paid sales-

men, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, pay of persons in the military or naval forces of the United States, retired pay of Federal and other officers, and pensions or retiring allowances paid by private persons or by the United States are income to the recipients; as are also marriage fees, baptismal offerings, sums paid for saying masses for the dead, and other contributions received by a clergyman, evangelist, or religious worker for services rendered. However, so-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and are not taxable. * * *

**STATEMENT**

The facts, as found by the Board of Tax Appeals, may be stated as follows:

Hiram Walker-Gooderham & Worts, Limited, is a Canadian company which operates entirely through subsidiaries. Hiram Walker & Sons, Limited, is the subsidiary operating in Canada; Hiram Walker & Sons, Incorporated, is the subsidiary operating in the United States (R. 15–16).

Petitioner was originally employed by Hiram Walker & Sons, Limited, on February 15, 1927, and later became its general superintendent and a director of that company. Hiram Walker & Sons, Incorporated, was incorporated in 1933 and petitioner became vice president in charge of production of that company, his duties being to build,

organize and operate a distillery in Peoria, Illinois (R. 16).

Petitioner became a director of Hiram Walker-Gooderham & Worts, Limited, about November 1933, and received an annual director's fee of $2,000 per year. Petitioner devoted practically all of his time to the affairs of Hiram Walker & Sons, Incorporated, and his salary was paid by that company. For the years 1936 and 1937, his salary was $30,000 per year. This was like in amount to the salary received by the chairman of the boards of the parent company and Hiram Walker & Sons, Incorporated, and was equal to 75% of the salary received by the president of Hiram Walker & Sons, Incorporated (R. 16).

On May 12, 1937, petitioner tendered his resignation as an employee of Hiram Walker & Sons, Incorporated, to its president, Mr. Hume. Action on it was deferred until a meeting of the board of directors of Hiram Walker-Gooderham & Worts, Limited, which was to be held in about 10 days (R. 16).

On May 28, 1937, petitioner attended the meeting of the parent company and tendered his resignation as an employee of Hiram Walker & Sons, Incorporated, and as a member of the board. He stated his reasons to be that he felt that his talents were not being utilized and that his major work had been completed. After a request for reconsideration, which petitioner refused, his resigna-

tion was accepted. He then left the meeting and thereafter the following resolution was passed (R. 17):

> It was moved by Mr. McCarthy, seconded by Mr. Lash, and unanimously carried, that Mr. Willkie be given a cheque equal to six months' salary in appreciation of services rendered.

Petitioner indicated that he did not wish to accept such a check, but he was urged to do so. A check of Hiram Walker & Sons, Incorporated, in the amount of $15,000, was handed petitioner on May 31, 1937, which he accepted. At the time petitioner resigned, he had been paid sums due him under his contract of employment with Hiram Walker & Sons, Incorporated, and as a director of the parent company (R. 17).

Petitioner did not report the $15,000 as taxable income on his federal income tax return for 1937 but indicated that he had received that amount as a gift from Hiram Walker & Sons, Incorporated (R. 17). The federal income tax return of Hiram Walker & Sons, Incorporated, for the year in question showed that it deducted the $15,000 for the purpose of arriving at its taxable income, claiming it as compensation paid petitioner (R. 17).

The Board of Tax Appeals held that the payment in question was compensation to petitioner for services rendered and not a gift (R. 18). The Circuit Court affirmed (R. 99).

ARGUMENT

The conclusion reached by the Board of Tax Appeals, and affirmed by the court below, that the amount received by the petitioner from the employer company was additional compensation for services rendered, and not a gift within the meaning of the income tax statutes, involves the application of recognized general principles to the particular facts of the case, and presents no basis for the issuance of the writ.

1. The petitioner asserts (Pet. 6) that the decision here conflicts with the decision of this Court in *Bogardus* v. *Commissioner,* 302 U. S. 34. But in that case this Court recognized that it would serve no useful purpose to attempt to reconcile the numerous decisions dealing with this question and proceeded to look to the facts and circumstances of the particular case before it.

In analyzing the situation in the *Bogardus* case, this Court first emphasized the fact that the recipients of the bounty there never were employees of the Unopco Company, which made the payments in question. This Court further buttressed its conclusion that the payments could not be treated as compensation by reference to the stipulated fact that the disbursements were not made or intended to be made for any services rendered to the Unopco Company. This Court then stated that if the disbursements had been made by the Universal Company, the employer of the recip

ients, there might be ground for the inference that they were payments of additional compensation, referring at that point to *Noel* v. *Parrott,* 15 F. (2d) 669 (C. C. A. 4th), certiorari denied, 273 U. S. 754, which involved facts very similar to those of the case at bar.[1] Thus, we submit, the *Bogardus* decision does not announce the basic principle upon which petitioner relies, that taxability depends upon present or anticipated consideration, as distinguished from past consideration. There, as here, the decision depended upon the particular facts and circumstances.

In *Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716, 730, this Court ruled that the "payment for services, even though entirely voluntary," may nevertheless be compensation within the meaning of the income-tax statute. In that case this Court referred approvingly to *Noel* v. *Parrott, supra,* a decision similar to that of the circuit court in this case. Thus the applicable decisions of this Court are not inconsistent with the decision below.

2. The petitioner further asserts (Pet. 5) that the decision below conflicts with *Jones* v. *Commissioner,* 31 F. (2d) 755 (C. C. A. 3d), and *Cunningham* v. *Commissioner,* 67 F. (2d) 205 (C. C.

[1] In the *Noel* case, the court approved a tax upon payments made to officers who were then resigning from the company, although the resolution referred to the payments as (p. 669) "a gratuitous appropriation."

A. 3d).[2] The *Jones* decision is distinguishable because of the fact that the payment to the taxpayer there was made by the stockholders individually and not by the employer company. In that respect the case is similar to the *Bogardus* case. The reasoning of the *Cunningham* case would mean that a bonus was never taxable compensation. This reasoning cannot survive the *Bogardus* decision and affords no support for the petitioner's asserted distinction between present and past consideration. The payment there involved was awarded to an officer who resigned by request.

3. The assertion (Pet. 6–7) that the Circuit Court of Appeals departed from the usual course of judicial proceedings, in giving weight to a presumption that the company's books would have shown that the payment was treated as compensation, is without substance. In view of the burden of proof upon the taxpayer here, the stipulation (R. 40–41) that the company treated the $15,000 payment as compensation in computing its income tax for the year in question, and the requirement that returns be made in accordance with the books, the court below was warranted in assuming that

[2] The decisions reached in *Hall* v. *Commissioner*, 93 F. (2d) 1005 (C. C. A. 4th), and *Simpkinson* v. *Commissioner*, 93 F. (2d) 1015 (C. C. A. 5th), likewise asserted to be in conflict, need not be separately discussed since they are based upon the same facts as were involved in the *Bogardus* decision, *supra*.

the payment was treated as compensation on the books of the company.[3] It has been held several times that in such circumstances proof of the treatment in the employer's income-tax returns alone is sufficient to sustain the finding. *Noel* v. *Parrott, supra; Botchford* v. *Commissioner,* 81 F. (2d) 914 (C. C. A. 9th); *Commissioner* v. *Bonwit,* 87 F. (2d) 764 (C. C. A. 2d).

## CONCLUSION

The decision below is correct. It involves the application of recognized general principles to the particular facts and circumstances of this case. There is no conflict. The petition should be denied.

Respectfully submitted.

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J. LOUIS MONARCH,
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SEPTEMBER 1942.

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[3] Taxpayers are entitled to subpoenas for the production of necessary books. Section 908, Revenue Act of 1924, c. 234, 43 Stat. 253, as amended by Section 1000 of the Revenue Act of 1926, c. 27, 44 Stat. 9.

U. S. GOVERNMENT PRINTING OFFICE: 1942